IN THE COURT OF APPEALS OF IOWA

No. 3-1169 / 13-0652
Filed January 9, 2014

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LINDA KAY KELSEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, James D. Coil, District Associate Judge.

Linda Kelsen appeals the judgment and sentence following her conviction for theft in the third degree. **AFFIRMED.**

Gregory F. Greiner of Greiner Law Office, P.C., Waterloo, for appellant.

Thomas J. Miller, Attorney General, Mary A. Triick, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Shana Schwake, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Mullins and McDonald, JJ.

VOGEL, P.J.

Linda Kelsen appeals the judgment and sentence following her conviction for theft in the third degree, claiming the district court judge should have recused himself from the sentencing hearing. She further asserts the district court abused its discretion in suspending the sentence rather than granting her a deferred judgment. Alternatively, Kelsen argues counsel was ineffective for failing to request the judge recuse himself and for failing to object to the district court's consideration of uncharged conduct during sentencing. Because we conclude Kelsen did not preserve error on her first claim and the district court did not abuse its discretion when sentencing Kelsen, we affirm. We preserve her ineffective-assistance claim for possible postconviction proceedings.

I. Factual and Procedural Background

On July 5, 2012, Kelsen placed a large number of items from a department store in her bag and attempted to leave without paying. She was arrested and charged with theft in the third degree. She signed a written *Alford* plea, which was accepted by a district associate judge, though not the same judge who presided over her sentencing hearing. On March 25, 2013, the court sentenced Kelsen to 180 days incarceration—suspended—and supervised probation for a period of twelve to twenty-four months, as well as assessed various surcharges and fines.[1] Kelsen appeals the sentence.

[1] At the same hearing Kelsen entered a guilty plea to another unrelated charge—a misdemeanor theft charge—and was sentenced on this conviction as well, though she only appeals the sentence for the third-degree theft charge.

II. Recusal

A. Direct Claim

Kelsen asserts the district court judge erred by failing to recuse himself, because he refused to accept Kelsen's *Alford* plea and required another district associate judge to accept the plea. However, Kelsen has failed to preserve error on this claim.

"The doctrine of error preservation has two components—a substantive component and a timeliness component." *State v. Krogmann*, 804 N.W.2d 518, 523 (Iowa 2011) (holding a one-page resistance that stated there was no legal basis for the State's actions did not properly preserve error with respect to the defendant's constitutional claims). To preserve error on appeal, the party must first state the objection in a timely manner, that is, at a time when corrective action can be taken, in addition to the basis for the objection. *Id.* at 524. The court must then rule on the issue. *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012). "If the court's ruling indicates that the court *considered* the issue and necessarily ruled on it, even if the court's reasoning is 'incomplete or sparse,' the issue has been preserved." *Id.* (quoting *Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002)).

Here, Kelsen did not raise the issue of whether the district associate judge should have recused himself during the sentencing hearing. Though in her motion for reconsideration of sentence she requested a new sentencing hearing and that the judge recuse himself, raising this issue in a motion post-motion-sentencing does not satisfy the timeliness component of our error preservation rules, given the district court could not consider the issue at a time when

corrective action could be taken. *See Krogmann*, 804 N.W.2d at 524. Therefore, Kelsen did not properly preserve error, and we decline to address the merits of her claim.

B. Ineffective-Assistance Claim

Alternatively, Kelsen asserts trial counsel was ineffective for failing to request the judge recuse himself at the sentencing hearing. A defendant may raise an ineffective-assistance claim on direct appeal if the record is adequate to address the claim. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). We may either decide the record is adequate and issue a ruling on the merits, or we may choose to preserve the claim for postconviction proceedings. *Id.* We review ineffective-assistance-of-counsel claims de novo. *Id.* To succeed on this claim, the defendant must show, first, that counsel breached an essential duty and, second, that he was prejudiced by counsel's failure. *Id.* If the defendant's ineffective-assistance claim lacks prejudice, we may decide the claim on that ground alone. *Ledezma v. State*, 626 N.W.2d 134, 144 (Iowa 2001).

Though it is her burden to establish both prongs of her claim, Kelsen has not set forth any facts upon which we could make an ineffective-assistance finding. *See id.* at 142 (stating it is the defendant's burden to show both prongs by a preponderance of the evidence). The basis of Kelsen's claim rests on the argument the judge initially refused to accept her plea because it was an *Alford* plea. However, other than Kelsen's statements in her brief, we have no record of this. She filed no bill of exceptions available under Iowa Rule of Criminal Procedure 2.25, nor prepared a statement of the evidence under Iowa Rule of Appellate Procedure 6.806(1). It is well settled that unreported remarks by a

district court cannot be the basis for a posttrial motion for recusal. *In re Marriage of Ricklefs*, 726 N.W.2d 359, 362 (Iowa 2007). Because there is no record, Kelsen has failed to meet her burden to show counsel either breached an essential duty or that she was prejudiced by counsel's failure. Therefore, considering the inadequate record before us, we decline to address the merits and preserve her claim for possible postconviction proceedings.

III. Sentencing Decision

Kelsen further argues the district court abused its discretion in suspending her sentence rather than deferring her judgment because the court sentenced Kelsen on a matter in which it would not previously accept her plea, relied on the nature of the offense alone, did not consider the relevant factors presented in mitigation of the offense, and considered uncharged misconduct.

We review sentencing decisions for an abuse of discretion. *State v. Evans*, 672 N.W.2d 328, 331 (Iowa 2003). An abuse of discretion is only found when the court exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable. *Id.* "Sentencing decisions are cloaked with a strong presumption in their favor. A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure, such as trial court consideration of impermissible factors." *State v. Grandberry*, 619 N.W.2d 399, 401 (Iowa 2000).

When imposing the sentence, the district court stated:

> I did review the files in-depth here. I've taken into consideration the information offered by your attorney and your past as well as your events in your life, I guess, as your attorney has described as traumatic, and certainly they are very traumatic, and you have my sympathies for the death of your son as well. But

> in balancing these issues with the circumstances of the offenses I find that a deferred judgment is not warranted.
>
> You were picked up for theft, I believe, in January, February of 2012 and then again in July of 2012, and I did review the aggravated misdemeanor. Well, I reviewed both cases, and it appears that there was certainly some planning on your part in committing these offenses. You took containers in bags, I guess, if you will, into the stores, and it appears that you did that specifically with the intent to commit these thefts.
>
> It somewhat mystifies that a person of your age, being 58 years old, your educational background, would think that this was okay, that you could do this, and what is particularly bothersome, Ms. Kelsen, is the fact that you committed one theft. You were arrested for that. You knew it was wrong, but then you go into another store . . . spend two hours picking out items of merchandise that you evidently want, place it in bags and then try and steal there.
>
> And what is somewhat even more mystifying for me as to why somebody like you would do this is you have an income of $3000 a month. You had the ability to pay for these items, although you told the police, I think, something to the contrary, that you couldn't afford them and you had some birthdays that were coming up or something and you were stealing for that reason.
>
> Given the circumstances, Ms. Kelsen, although I did sit here and ponder for quite some time, I don't believe that a deferred judgment is warranted in your cases, and so those are the reasons for imposition of the sentences which were entered.

Upon review of the record, we find no abuse of discretion. The court considered the proper factors and did not consider any improper factors, such as uncharged or unproven conduct. Therefore, Kelsen's claim is without merit, and we affirm her sentence. Because we conclude the district court did not consider any improper factors, specifically uncharged misconduct, we need not address Kelsen's ineffective-assistance claim raising this argument.

AFFIRMED.